No. 80-62

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In the Supreme Court of the United States

OCTOBER TERM, 1979

ELIOT H. WEISMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's instructions on the racketeering enterprise count constituted reversible error.

2. Whether petitioner's confession was properly admitted into evidence.

3. Whether petitioner waived his reverse immunity claim in the district court.

4. Whether petitioner's Sixth Amendment right to counsel was violated by the admission into evidence of tapes of his conversations with a government informant that were surreptitiously recorded with the consent of the informant.

5. Whether the district court erred in instructing the jury with respect to two terms that were used in the indictment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-28) is not yet reported. The pre-trial opinions of the district court (Pet. Supp. App. B-1 to B-19, B-20 to B-33) are reported at 461 F. Supp. 778 and 461 F. Supp. 800. The post-trial opinion of the district court (Pet. App. C-1 to C-3), on remand from the court of appeals, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1980. A petition for rehearing was denied on June 10, 1980 (Pet. Supp. App. D-1). The petition for a writ of certiorari was filed on July 10, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner and nine co-defendants were indicted in June 1978 on charges arising out of the creation, operation, and bankruptcy of the Westchester Premier Theatre in Tarrytown, New York. Following a two-month jury trial, petitioner was convicted on one count of operating the Theatre through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), nine counts of fraud in the sale of securities, in violation of 15 U.S.C. 77q(a) and 77(x), nine counts of bankruptcy fraud, in violation of 18 U.S.C. 152, one count each of conspiracy to commit securities fraud and conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. 371, and one count of endeavoring to obstruct a grand-jury investigation, in violation of 18 U.S.C.

1503.[1] Petitioner was sentenced to six and one-half years' imprisonment, to be followed by a three-year term of probation, and fines totalling $15,000. The court of appeals affirmed (Pet. App. A-1 to A-28).

The evidence at trial showed that the Theatre, from its inception to its collapse, was operated through a wide-ranging pattern of fraud. In May 1973, petitioner and his partners Gregory J. DePalma and Richard Fusco sought to raise more than $2 million for the construction of the Theatre through a fraudulent public offering of 300,000 shares of common stock. By the terms of the public offering, at least 275,000 of the shares had to be sold by June 12, 1973, the closing date for the offering. If this minimum number of shares was not sold by that date, the monies paid by investors for the stock would have to be refunded (Tr. 1553, 1232; GX 5, 6AAA).[2] The prospectus filed with the Se-

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[1] A previous trial, which lasted three months, ended in a mistrial when the jury deadlocked as to all defendants except Anthony Gaggi, who had previously been granted a verdict of acquittal under Fed. R. Crim. P. 29. Following the mistrial, co-defendants Richard Fusco, Gregory J. DePalma, Louis Pacella, and Thomas Marson pleaded guilty to various charges. The second trial involved only petitioner and co-defendants Murad Nersesian, Salvatore J. Cannatella, and Leonard Horwitz; co-defendant Laurence I. Goodman was not retried. After four days of deliberations, the jury acquitted Nersesian on all counts and returned guilty verdicts on all counts against petitioner, Cannatella, and Horwitz. The court of appeals affirmed these convictions. See Pet. App. A-1 to A-28; *United States* v. *Horwitz*, 622 F.2d 1101 (2d Cir. 1980), petition for cert. pending, No. 79-2065 (filed June 27, 1980).

[2] The citations herein to the record are taken from the government's brief in the court of appeals. "Tr." refers to the trial transcript; "GX" refers to the government's exhibits at trial; and "App." refers to the joint appendix in the court of appeals.

curities and Exchange Commission failed to disclose several significant facts to prospective investors: (1) that DePalma and Fusco, both of whom had criminal records, were principals in the Theatre (Tr. 851, 872-875, 878-881, 912-914, 919, 947, 1396-1397, 3854-3855; GX 3A-B, 5); (2) that approximately $375,000 had been loaned to the Theatre, much of it at usurious interest rates;[3] (3) that a portion of the $375,000 had been used to buy stock in nominee names controlled by petitioner and his partners, in order to create the false impression that the Theatre stock was being purchased by the investing public (Tr. 994-1002, 1004-1007, 1562-1580, 1591-1598, 2200-2201; GX 3G-N, 3AA, 3CC-GG, 6D-6CC, 6BBB, 6CCC, 11A); and (4) that certain investors had been induced to buy Theatre stock by cash pay-offs, guarantees against loss, promises of extra shares out of petitioner's holdings of 455,000 shares, and promises of business from the Theatre (Pet. App. A-4; Tr. 1684-1686; GX 5, 6AAA).[4]

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[3]Petitioner received $50,000 from John Capra, $125,000 or more from Murad Nersesian, $100,000 from Carlo Gambino, $50,000 from Ruby Weiner, $20,000 from Nino Gaggi, $10,000 from Nick Saldi, and $20,000 from Charles Carino. These loans were not disclosed to the public. Instead, the only disclosure of the loans in the prospectus was that "[i]n December 1972 and February 1973 the Company borrowed an aggregate of $45,000" and that "on May 22, 1973 Mr. Weisman loaned the Company $20,000." However, even the statement concerning the $20,000 loan from Weisman was false, since this money was actually a loan from Nick Saldi and other undisclosed sources (Tr. 933-950, 964-969, 993-994, 996-997, 1051-1052, 1097-1098, 1397-1400, 2488-2501, 2513-2514, 2524, 2605; GX 2EEE, 2FFF, 3F, 3Y, 6AAA).

[4]For example, petitioner arranged through Leonard Horwitz for Warner Communications to purchase 20,000 shares of

Due to these efforts, the public offering was successful. The Theatre opened in March 1975, at which time petitioner and his confederates began systematically to skim and convert to their own use money received by the Theatre from ticket sales and various concessions. Portions of these funds were also used to pay back various secret debts incurred during the public offering (Pet. App. A-4). The secret loans and the Theatre profits skimmed to pay the usurious interest on them were not reflected in the Theatre's books and records (Tr. 1088-1089, 1097-1098, 2501, 3181-3182).

In December 1976, as a result of the massive skimming of its proceeds, the Theatre filed a petition in federal bankruptcy court pursuant to Chapter XI of the Bankruptcy Act and was adjudicated a "debtor-in-possession." Under Chapter XI, the Theatre was permitted to continue operations without having to

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Theatre stock for $150,000. He did so by giving two Warner executives, Jay Emmett and Solomon Weiss, a $50,000 cash pay-off (Tr. 952-958, 1419, 1609-1611, 2235; GX 10A-D). Petitioner also induced the George A. Fuller Company to purchase 10,000 shares by guaranteeing it against loss and promising it the construction contract for the Theatre. Similar secret deals were made with numerous other companies and individuals (Tr. 925-928, 1613, 1681-1683, 2202, 2207, 2458, 2514-2516; GX 7A, 11A, 16A-C, 39).

Before the Theatre opened, Warner Communications was induced to buy another 20,000 shares of stock for $100,000—at least $80,000 above the market price—and to make an additional secret payment to the Theatre of $50,000; in return, the Theatre gave Emmett $20,000 in cash and promised that, after the Theatre opened, Emmett and Weiss would receive between $100,000 and $150,000 in cash (Tr. 1611-1627, 2236, 2323-2326, 2531-2533, 2841; GX 4H, 4L, 6LL-NN, 6BBB, 10E-HH, 12A-D).

make immediate payments to its creditors. At the same time, attempts were made to reach an arrangement with the Theatre's creditors to settle their claims using the profits of the Theatre. As a "debtor-in-possession," the Theatre was authorized to pay only salaries and operating expenses; all other expenditures were required to be approved by the bankruptcy court (Pet. App. A-5; Tr. 3052-3055; GX 52, 54). During the Chapter XI proceedings, petitioner, Cannatella, and the others continued to skim from the Theatre's proceeds as they had throughout 1975 and 1976, while attempting to force the Theatre's legitimate creditors to accept a settlement of 10 to 15 cents on the dollar.

In May 1977, a federal grand jury began investigating the operations of the Theatre. At that time, petitioner and Horwitz attempted to persuade various prospective grand jury witnesses not to disclose the fraudulent transactions (Pet. App. A-5).

ARGUMENT

1. Petitioner's principal contention is that the district court's charge to the jury on the RICO count was erroneous. Petitioner makes two separate arguments on this point. First, he contends (Pet. 8-12) that the court erred in denying his request that the jury be instructed that even if it found that he had committed two or more predicate acts of racketeering within a 10-year period, an unlawful "pattern of racketeering" would not be established unless the predicate acts were also found to be "related" to each other through a "common scheme, plan or motive" (Pet. App. A-7). Second, he contends (Pet. 12-14) that the court incorrectly charged the jury that the two conspiracy counts

alleged in the indictment could constitute the predicate acts of racketeering required under Section 1962(c).

a. Both the language of the statute and its legislative history refute petitioner's claim that the predicate acts of racketeering must be specifically "related" to each other. By its express terms, the statute defines a "pattern of racketeering activity" to require only two acts of racketeering activity within a 10-year period. 18 U.S.C. 1961(5). Moreover, as the court of appeals observed (Pet. App. A-9), "the enterprise itself supplies a significant unifying link between the various predicate acts." See *United States* v. *Elliott*, 571 F.2d 880, 899 & n.23 (5th Cir.), cert. denied, 439 U.S. 953 (1978).[5]

The legislative history of the statute, which is reviewed in detail in the district court's opinion (Pet. Supp. App. B-4 to B-8), confirms that Congress meant what it said in defining "pattern of racketeering activity" as it did in Section 1961(5).[6] After considering the extensive time and effort that Congress devoted to arriving at the definition of "pattern of racketeering activity," the district court correctly con-

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[5] Petitioner contends (Pet. 11-12) that the decision below conflicts with *United States* v. *Kaye*, 556 F.2d 855, 860-861 (7th Cir.), cert. denied, 434 U.S. 921 (1977). See also *United States* v. *Weatherspoon*, 581 F.2d 595, 601 n.2 (7th Cir. 1978). However, the court in *Kaye* held only that the acts charged in that case were sufficiently related to establish a "pattern" even under the standard advanced by the defendant.

[6] Congressman Poff, the sponsor of the bill in the House, clearly stated that "[a] 'pattern of racketeering activity' means simply two or more acts of racketeering activity, one of which * * * must have occurred subsequent to enactment of the title." 116 Cong. Rec. 35295 (1970).

cluded (Pet. Supp App. B-5) that if Congress had wanted to provide for any greater degree of "relatedness," it would have said so.

In any event, the court of appeals found in the present case that "the predicate acts of racketeering were closely related" and that petitioner's contention "that a jury could find that the acts of racketeering activity he engaged in were sporadic and unrelated [is] completely untenable" (Pet. App. A-10 to A-11 n.4; see also Pet. Supp. App. B-9, B-10 to B-11); indeed, as the court noted (Pet. App. A-10), "a more appropriate application of the statute would be difficult to imagine." Petitioner does not contend that this assessment was incorrect. Accordingly, the instant case does not present a suitable occasion to resolve any question that may exist concerning the definition of a "pattern of racketeering activity" under RICO.

b. Petitioner's second claim—that a conspiracy offense cannot be a predicate act of racketeering under Section 1962(c)—is also without merit. First, the instruction he now complains of was the very one he requested. See App. 76a. Having sought the charge given by the district court, he may not now be heard to object. See, *e.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

At all events, the district court's charge was proper. At the time of the trial, Section 1961(1) provided that

> 'racketeering activity' means * * * (D) *any offense involving* bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous

> drugs, *punishable under any law of the United States;*

18 U.S.C. 1961(1)(D) (emphasis added).[7] As the court of appeals stated (Pet. App. A-12):

> This language is certainly broad enough on its face to include conspiracies involving securities and bankruptcy fraud and drug related offenses. The deletion of conspiracy from earlier drafts of RICO does not undermine this conclusion. In those drafts, the conspiracies chargeable as predicate acts could relate to a broad number of offenses now listed in subsections (A) to (C) of section 1961. While this specific reference to conspiracy was deleted from the final version of RICO, the expansive language quoted above was retained in a separate section—section 1961(1)(D). Thus, the alterations of section 1961(1) are most logically interpreted as an attempt to restrict the conspiracies chargeable as predicate offenses to those involving offenses listed in subsection (D). This conclusion is bolstered by the fact that subsections (B) and (C), which list most of the other predicate acts chargeable under RICO, conspicuously lack the broad "any offense involving" language of subsection (D) and, in fact, require that the act be indictable under specifically enumerated sections of the criminal code.

Finally, even if the two conspiracy counts could not be charged as predicate acts of racketeering, such error was harmless in this case because the jury also found petitioner guilty of nine substantive counts of

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[7] Effective October 1, 1979, this section was amended to substitute "fraud connected with a case under title 11" for "bankruptcy fraud." 18 U.S.C. (Supp. II) 1961(1)(D).

bankruptcy fraud and nine counts of fraud in the sale of securities, all of which were charged as predicate acts of racketeering.[8] As the court of appeals found (Pet. App. A-13 to A-14), "the jury could not have rationally concluded that the conspiracies to commit bankruptcy and securities fraud occurred in the conduct of the Theatre's affairs without also finding that the substantive offenses carried out in the course of the conspiracies also took place in the conduct of the Theatre's affairs." Petitioner does not question the correctness of the court of appeals' determination that any error in the jury instruction was harmless, and thus further review is unwarranted.

2. Petitioner next urges (Pet. 14-16) that the district court erred in not suppressing certain inculpatory statements he made to the government on September 19, 1977. Petitioner had been arrested on September 16 pursuant to a warrant issued by a magistrate against him and his wife for allegedly making false statements on a bank loan application, in violation of 18 U.S.C. 1014 (a charge unrelated to the present indictment). Petitioner was twice advised of his *Miranda* rights and, after signing a waiver of rights form, was questioned by Assistant United States Attorney Nathaniel Akerman. The focus of the interview soon shifted from the alleged bank loan fraud to the subject of the government's investigation of the crimi-

[8]The district court concluded that the nine counts of securities fraud could constitute only a single predicate act of racketeering because they arose "out of the same episode" (Pet. App. A-13 n.5). Thus, aside from the two conspiracy counts, there were 10 separate predicate acts of racketeering, any two of which would be sufficient to sustain the conviction on the RICO count.

nal activity involving the Theatre. Akerman outlined some of the government's evidence and informed petitioner that he might receive a 20-year prison term for racketeering.[9] Petitioner was told that if he cooperated in the grand jury's ongoing investigation of the Theatre's operations, the fact of his cooperation would be brought to the attention of the judge. Petitioner responded that he would cooperate in any way he could (Pet. App. A-15 to A-16; Pet. Supp. App. B-24 to B-26; App. 403a-410a, 415a-416a, 480a). Throughout the interview, Akerman repeatedly advised petitioner that he had the right to counsel and that he could call any lawyer he wished (App. 414a-415a; see also Pet. 15 n.9).

At the conclusion of the interview, petitioner was told that he would have to be arraigned on the false bank loan complaint the next morning before a United States magistrate. However, petitioner stated that if he were arraigned publicly before a magistrate and if he were not later prosecuted on the bank loan charge, DePalma and Fusco would suspect that he was cooperating with the government. Because petitioner feared for his physical safety, Akerman arranged to have petitioner arraigned at the home of a district judge the following day (App. 416a-418a). The judge informed petitioner of the complaint against him and advised him of his constitutional rights. With the government's consent, the judge released petitioner on his own recognizance (Pet. App. A-16; Pet. Supp. App. B-26; App. 417a-418a, 603a, 688a-689a, 696a).

[9] Akerman also played an incriminating tape recording of a conversation in which petitioner had discussed with DePalma the division of the skim from a Frank Sinatra concert (GX 2QQ).

Two days later, on September 19, 1977, petitioner met with Akerman and two FBI agents at the Sheraton Motel in Riverside, Connecticut, a location chosen at petitioner's request because he was afraid of being seen either at the United States Attorney's office or the FBI office. After again being advised of his rights and signing a second waiver form, petitioner answered questions regarding the operation of the Theatre. On October 2, 1977, the complaint against petitioner and his wife concerning the bank loan application was dismissed on the government's motion. At that time the government believed that petitioner would cooperate and plead guilty to a felony carrying at least a five-year penalty (App. 418a–420a, 423a–424a). On October 4, 1977, petitioner appeared at the United States Attorney's office to discuss his cooperation with the government. He acknowledged that he had been advised of his rights on all previous occasions and that he understood those rights. There was no further discussion, however, because petitioner stated that he wished to seek counsel (App. 424a–427a).[10] Petitioner thereafter declined to cooperate further with the government, and the instant indictment was subsequently returned (Pet. App. A–16; Pet. Supp. App. B–27).

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[10] After it became obvious that petitioner would not cooperate, the government continued to pursue its investigation into the false statements on the bank loan application. In that regard, witnesses testified before the grand jury as late as December 9, 1977. However, the government decided that its efforts would be better spent pursuing the Theatre investigation than bringing petitioner to trial on the bank loan charge—particularly since the statute of limitations on the latter charge was about to run (App. 427a–428a).

Prior to trial, petitioner moved to suppress his statements of September 16 and 19 as the products of an illegal arrest. The district court ruled that the arrest had been improper because the complaint did not provide an adequate basis for the magistrate to find probable cause. The court also found that "one of the main purposes" for arresting petitioner on the bank loan charge was to obtain his cooperation in the investigation into the Theatre (Pet. Supp. App. B-32).[11] Accordingly, the court suppressed petitioner's statements of September 16. However, it denied the motion to suppress the September 19 statements, concluding that the intervening circumstances had sufficiently dissipated the taint of the original arrest (*id.* at B-32 to B-33). Specifically, the court noted the three-day lapse between the arrest and the statement, the formal arraignment before the district judge, the release of petitioner on his own recognizance and the accompanying opportunity to consult with counsel, the fact that the September 19 interview took place at a motel chosen by petitioner and not in FBI headquarters, and petitioner's informed waiver of his rights (*ibid.*). The court also took into consideration that petitioner was

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[11] Contrary to petitioner's statement (Pet. 6), the district court did not find that the bank loan arrest had been "a mere pretext" to induce petitioner to cooperate in the government's investigation into the Theatre or that the government had otherwise acted in bad faith. See Pet. App. A-18. The FBI agents arrested petitioner in good faith for the felony charge of making a false statement on a bank loan application. That they first presented the facts in their possession to a magistrate and obtained an arrest warrant, despite their authority to effect a warrantless arrest, clearly refutes petitioner's claim of gross misconduct.

"a sophisticated businessman who was fully aware of his rights and who had just testified before the grand jury and had consulted counsel in connection with that testimony" and that petitioner's "statements of September 16 were not recorded, other than some sketchy notes by one agent, and he signed no written confession" (*id.* at B-33). Based on these findings, the district court concluded that "[t]he statements at the [September 19] meeting appear to have resulted from a voluntary and informed decision by [petitioner] to cooperate with the Government * * *" (*ibid.*).

The court of appeals agreed with this attenuation analysis (Pet. App. A-18). It sustained the district court's determination that the September 19 statements were "the result of a 'voluntary and informed decision by [petitioner] to cooperate with the government' rather than the direct fruit of the September 16 illegal arrest" (*id.* at A-17). On this record, the court concluded that the statement was admissible because "the taint of the original arrest had been purged by intervening circumstances" (*id.* at A-18).

The decisions below are correct and, in any event, merely involve application of well-settled principles to the particular facts of this case. See, *e.g.*, *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980), slip op. 7-12; *Dunaway* v. *New York*, 442 U.S. 200, 216-219 (1979); *United States* v. *Ceccolini*, 435 U.S. 268 (1978); *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Wong Sun* v. *United States*, 371 U.S. 471, 491 (1963). Accordingly, further review by this Court is not warranted.[12]

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[12] We also note that petitioner's September 19 statement, which related exclusively to the bankruptcy fraud, was almost

3. Petitioner next argues (Pet. 16–17) that the courts below erred in ruling that he waived his claim to immunity for prospective defense witnesses by failing to raise the issue in the district court. Petitioner's argument is insubstantial. As the court of appeals stated (Pet. App. A–19), "[a]lthough the issue of reverse immunity was raised by [co-defendant] Horwitz in both trials and in his post-conviction motion for a new trial, [petitioner] never moved during either trial to immunize any potential defense witnesses and never sought post-conviction relief from the district court on this ground."[13]

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wholly cumulative of other evidence presented at trial, including tape recordings of his own conversations, and that petitioner's guilt on the bankruptcy fraud charges was established by overwhelming evidence apart from his statement. Thus, any error in the admission of his September 19 statement was harmless beyond a reasonable doubt.

[13] Following his conviction, Horwitz moved for a new trial on the ground that he had been denied due process by the government's use of immunity for its own witness but its refusal to grant immunity to two of his witnesses, the Warner executives Emmett and Weiss, who themselves were under a continuing government investigation for their role in the Theatre's affairs and were therefore unwilling to testify unless immunized. The district court granted Horwitz's motion for a new trial at which the testimony of the government's immunized witness would be suppressed if Horwitz's witnesses were not similarly immunized. *United States* v. *DePalma*, 476 F. Supp. 775 (S.D. N.Y. 1979). Upon the government's appeal, the court of appeals remanded the case for further consideration in light of the intervening decision in *United States* v. *Turkish*, Nos. 79–1326 and 79–1396 (2d Cir. May 27, 1980), which had "undercut the analytical foundation" of the district court's decision on the reverse immunity issue. *United States* v. *Horwitz*, 622 F.2d 1101, 1105 (2d Cir. 1980), petition for cert. pending, No. 79–2065 (filed June 27, 1980).

After he had filed a notice of appeal from his conviction, and after the district court had ruled favorably on Horwitz's motion for a new trial, petitioner moved the district court to clarify the record to indicate that he too had presented the reverse immunity claim. The court denied the motion, but the court of appeals subsequently remanded the case to the district court to determine whether petitioner had previously raised the reverse immunity issue. On remand, the district court concluded that petitioner "failed to properly raise the issue of reverse immunity prior to the time of appeal" (Pet. App. C-3). The court acknowledged that during both trials a motion made by one defendant was deemed to be adopted by all defendants, but it explained that this practice was employed primarily with respect to evidentiary objections and did not extend to post-trial proceedings (*id.* at C-2). Hence, Horwitz's post-conviction motion for a new trial did not raise a similar claim on behalf of petitioner.[14]

Moreover, as the district court observed, petitioner and Horwitz were in different evidentiary postures; while "the immunized testimony against Horwitz made up the bulk of the evidence against him" (Pet. App. C-2 to C-3), that was not the case with petitioner, whose guilt was supported by overwhelming evidence that not only proved his role in the Warner transactions but also demonstrated his undisputed leadership

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[14] Petitioner's assertion (Pet. 16 n.11) that Horwitz's counsel advised the court that petitioner also joined in the reverse immunity motion distorts the record. The record shows (Tr. 3863-3881) that Horwitz's counsel was referring to a completely unrelated motion; the reverse immunity claim was not mentioned.

in every other aspect of the stock fraud scheme. Thus, any exculpatory testimony by Emmett and Weiss, aside from its doubtful reliability, would have affected only a portion of the government's case against petitioner. In these circumstances, the district court correctly concluded (Pet. App. C-3) that "it would have been incumbent upon [petitioner] * * * to address the proof as it applied to him in order to advance the same claim [as Horwitz] of deprivation of a constitutional right." The court of appeals saw "no reason to disturb this ruling" (*id.* at A-20), noting that "a contrary rule would force the district judge to determine on his own initiative and without assistance which particularized requests of one defendant should be extended to other co-defendants" (*id.* at A-21).[15]

4. Petitioner further claims (Pet. 19-20) that the district court erred in admitting into evidence tapes of his conversations with government informant Norman Brodsky that had been surreptitiously recorded with Brodsky's consent. Petitioner asserts that the introduction of the tapes violated his Sixth Amendment right to counsel under *Massiah* v. *United States*, 377 U.S. 201 (1964), and *United States* v. *Henry*, No. 79-121 (June 16, 1980).

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[15] In any event, as we discuss in our Brief in Opposition in *Horwitz* v. *United States*, petition for cert. pending, No. 79-2065, a copy of which is being sent to counsel for petitioner, Horwitz's argument for reverse immunity is without merit, and petitioner's claim certainly fares no better; indeed, because of the differences in evidence against them, petitioner is in a far weaker position to contend on the merits that he was deprived of a fair trial.

The district court correctly rejected this claim (Pet. Supp. App. B-12 to B-13) on the ground that, at the time the recordings were made, petitioner was not facing adversary judicial proceedings. See *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972). Petitioner's tape-recorded conversations with Brodsky occurred two months after the bank loan complaint had been dismissed (see page 11, *supra*) and six months before the instant indictment was returned. Since no criminal proceedings were pending against petitioner, his *Massiah* claim is completely unfounded. See *United States* v. *Hinton*, 543 F.2d 1002, 1015 (2d Cir.), cert. denied, 429 U.S. 980 (1976); *United States* v. *Missler*, 414 F.2d 1293, 1302 (4th Cir. 1969), cert. denied, 397 U.S. 913 (1970); *United States* v. *Edwards*, 366 F.2d 853, 873 (2d Cir. 1966), cert. denied, 386 U.S. 919 (1967).

5. Petitioner's final contention (Pet. 17-19) is that the district court improperly failed to define for the jury the terms "promoter" and "principal operator" that were used in the indictment. The indictment stated that the prospectus for the Theatre contained a section entitled "management," which purported to set forth the identities of the executive officers of the Theatre. The indictment alleged that DePalma and Fusco were not identified in that section or elsewhere in the prospectus as "principal operators and promoters of the Theatre" and that the absence of their names was a material omission. The government's proof at trial showed that, before and during the public stock offering, DePalma and Fusco shared equal control of the Theatre with petitioner and were described by petitioner as his partners (Tr. 1587-1588).

At petitioner's request, the district court took judicial notice of the definition of "promoter" found in the SEC regulations and read the definition to the jury (Tr. 3855-3858); the term "principal operator," the court noted, is not defined in the regulations (Tr. 4741-4742). The court then instructed the jury that they had to determine whether the failure to mention DePalma and Fusco in the prospectus, in light of their role in the management of the Theatre, was a material omission (*ibid.*).

Petitioner argues that the court's failure to define "principal operator" or to require that the jury apply the SEC's definition of "promoter" exposed him to criminal liability for conduct that is not proscribed by the securities laws. However, to convict petitioner of the charged securities violations, the jury had to find, as it was correctly instructed, that the alleged omission existed and was material. Moreover the SEC regulations expressly provide that, in addition to information specifically required, a registration statement must also contain "such further material information * * * as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading." See 17 C.F.R. 230.408. Accordingly, the instructions in this regard were not erroneous.[16]

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[16]There is no basis for petitioner's assertion (Pet. 18 n.15) that the lack of a definition of the term "principal operator" might have led the jury to find that DePalma and Fusco were "principal operators" based on their participation in entities that had direct dealings with the Theatre, such as the parking concession or the company that provided fill for the Theatre's construction site. The district court instructed the jury that it had

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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to find that DePalma and Fusco were "operators" at the "time of the public offering," and there was no evidence that DePalma or Fusco had anything to do with either of those other companies at the time of the public offering (Tr. 4741–4742; App. 104a–105a).

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